



Ms Kate Fox
Secretary
UN Human Rights Committee
Office of the United Nations
High Commissioner for Human Rights
UNOG-OHCHR
1211 Geneva 10, Switzerland

Vienna, Oct 15, 2014

Dear Ms Fox,

Re: List of issues for the consideration of Spain's sixth periodic report under the International Covenant on Civil and Political Rights (ICCPR)

Pursuant to the List of Issues for the above report, the undersigned organisations wish to register their concern regarding the existence of legal and regulatory frameworks in Spain that may negatively impact freedom of expression and opinion as protected under Article 19 of the ICCPR.

A. DEFAMATION

The current regulation of defamation in Spain falls well short of international standards on freedom of expression, in particular those outlined by the Committee in its General Comment No 34.¹ The undersigned organisations are of the belief that overly broad defamation laws – those that do not strike a proper balance between freedom of expression and the protection of the reputation of individuals – have a chilling effect on the free flow of information. Democratic accountability suffers as a result. In recent years, powerful business and political figures in Spain have turned to defamation laws as way to stifle investigative journalism on serious wrongdoing, including revelations of corruption.²

Aspects of Spanish defamation that are of particular concern include, but are not limited to:

¹ For detailed information on international standards on free expression as related to the protection of reputation, see “Out of Balance”, International Press Institute, July 2014, available at: <http://www.freemedia.at/ecpm/international-standards.html>.

² For example, local Catalan magazine *Cafè amb Llet* was ordered to pay €10,000 in damages to businessman Josep Maria Via for article suggesting lack of transparency in healthcare industry; *El Mundo* journalist Eduardo Inda, renowned for his investigations into corruption, has been targeted for defamation on numerous occasions, including by former Catalan president Jordi Pujol.

- *Defamation remains a **criminal offence** in Spain, despite the Committee's recommendation that states should decriminalise defamation and replace it with appropriate civil defamation legislation that is formulated in a way that prevents abuse, allows for proper defences, and sets reasonable limits on compensation.*³
- While the **offence of injuria** ("defamation", Criminal Code Art. 208) is punishable only with fines, *the offence of calunnia* ("slander", Criminal Code Art. 205) *is punishable with imprisonment* of up to two years when committed via the media. This stands in striking contrast to the Committee's recommendations, which state that imprisonment and other criminal sanctions constitute a disproportionate punishment for defamation due to the wider chilling effect on free expression they may cause.
- *The regulation of civil liability does not meet the international freedom of expression standards.* The Organic Law on Civil Protection of the Right to Honour, to Personal and Family Privacy, and Personal Image⁴ fails to offer clear defences, including truth, good faith, and honest opinion (fair comment). There are no caps on damages, despite universal agreement that overly large damage awards may cause a chilling effect on the press and other speakers.⁵
- *Offending Spain or its symbols remains a criminal offence, as does defaming a range of governmental institutions* including the Spanish Parliament, the Constitutional and Supreme Courts, and the armed forces (Criminal Code Arts. 496, 504, and 543). Public bodies and symbols, however, cannot legitimately be the subject of defamation law.⁶ *Defaming members of the royal family* remains punishable under the Criminal Code with up to two years in prison (Criminal Code Art. 490).⁷

B. REGULATION OF AUDIOVISUAL MEDIA

Spain's current model of broadcast regulation does not guarantee sufficient independence in regulatory decision-making. Such independence is critical to ensuring that political, economic, or other interests are not able to monopolise or unduly influence media programming.⁸

Spain is the only EU country that does not have a dedicated national independent broadcasting regulator. In March 2010, the Spanish Parliament passed the General Audiovisual Law (*Ley General Audiovisual*),⁹ which foresaw the creation of a similar body,

³ See "General comment No. 34", Human Rights Committee, 102nd session, published 12 Sept. 2011, available at: www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf. §47: "States parties should consider the decriminalization of defamation [...] and imprisonment is never an appropriate penalty."

⁴ Ley orgánica 1/1982, de 5 de mayo, de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen, available at www.boe.es/buscar/doc.php?id=BOE-A-1982-11196.

⁵ See, e.g., decision of the European Court of Human Rights in *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland* (2005), available at: [.](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{)

⁶ See, e.g. General Comment 34 §38.

⁷ This provision continues to be actively applied, including against the press. See, e.g., "Spain royal sex cartoonists fined", BBC News, 13 Nov. 2007, <http://news.bbc.co.uk/1/hi/world/europe/7092866.stm>.

⁸ The undersigned observe that the Committee has emphasised the importance of having an independent regulatory authority. For example, in Paragraph 39 of General Comment 34 the Committee urged States Parties that had not already done so to "establish an independent and public broadcast licensing authority".

⁹ Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual, available at: <http://www.boe.es/buscar/act.php?id=BOE-A-2010-5292&tn=1&p=20120421>

the two-tiered State Council on Audiovisual Media (*Consejo Estatal de Medios Audiovisuales*, CEMA). Notably, membership in the *executive* tier would have required three-fifths approval by Parliament. A *consultative* tier would have included participation from the media industry, advertisers, and consumers. In January 2012, however, the current government announced plans to scrap CEMA and redistribute its proposed responsibilities. This decision was justified as a means to save the estimated €7 million needed to set up the council.¹⁰

The body that has largely acquired CEMA's proposed role is the **National Commission for Markets and Competition** (*Comisión Nacional de los Mercados y Competencia*, CNMC). CNMC, created in its current form in 2013, acts as a kind of national "superregulator", covering various additional sectors including transport and energy.¹¹ In contrast to CEMA, all 10 of CNMC's members are appointed by the government with no consultation from Parliament. The latter can veto the appointment of members only exceptionally upon grave suspicion of lack of independence, but this is not a sufficient guarantee given that the absolute majority needed usually reflects and supports the government in power.

The undersigned consider that implementing CEMA, or at least preserving its substance (e.g., cross-sector membership and supermajoritarian parliamentary appointment) within existing bodies, would be an important step toward safeguarding independence in Spanish broadcast regulation.

C. RIGHT OF ACCESS TO INFORMATION

The right of access to information is not recognised in Spain, with the Government having expressly rejected that it forms a fundamental part of the right to freedom of expression in spite of the clear affirmation of this by the UN Human Rights Committee in its General Comment No. 34 and by other bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights.

The non-recognition of the right of access to information is a denial of the public's right to be informed, as it makes it difficult for the public and for watchdogs such as journalists and civil society organisations to obtain information needed to hold the government accountable. The failure to grant this right also creates an unequal balance with other fundamental rights, in particular the right to privacy.

In 2013, the Spanish parliament adopted a freedom of information law, the Law on Transparency, Access to Information and Good Government,¹² one of the last countries in the European region to do so. The law, which will enter into force on 10 December 2014, falls below the standard set by the UN Human Rights Committee in General Comment No. 34 in a number of significant ways. These include:

- The law excludes key information from the reach of the right of access to information. Specifically, requests will be rejected if they seek to access "*opinions, summaries, and communications and reports internal to or between administrative*

¹⁰ See "No crear el CEMA supone un ahorro de siete millones de euros", Europa Press, 20 Jan. 2012, available at: <http://www.elmundo.es/elmundo/2012/01/20/comunicacion/1327073838.html>.

¹¹ Despite its name, CNMC's remit with respect to the audiovisual sector goes beyond ensuring fair competition. It is, for example, tasked with ensuring media compliance with both existing legislation and media codes of conduct, and has the power to issue sanctions and even rescind nation-wide broadcasting licenses. Further information on CNMC can be found in its legal basis, Ley 3/2013 de 4 de junio available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-5940.

¹² Ley 19/2013, de 9 de diciembre, de transparencia, acceso a la información pública y buen gobierno, available at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-12887.

organs or bodies." This highly restrictive scope means that the law's value in terms of ensuring government accountability, public participation in decision making and combatting corruption will be drastically reduced.

- The right of access to information does not apply to all public bodies as set out in Article 7 of General Comment No. 34, but rather is limited to administrative bodies and information, excluding other functions of the legislative and judicial branches.
- The oversight of the law is by a non-independent body, the Transparency Council, composed of representatives of other public bodies. Troublingly, the law allows the Council to adopt administrative silence as an outcome in appeals by the public against refusals by public bodies to release information. This double administrative silence permitted by the law runs counter to the requirement in General Comment No. 34 that "[a]uthorities should provide reasons for any refusal to provide access to information".

The undersigned believe both that Spain is currently in breach of its obligations under the ICCPR to ensure that the domestic legal framework guarantees the rights set out in the Covenant, and that the Law on Transparency, Access to Information and Good Governance should be strengthened.¹³

Should the Committee require further information on the above issues, we would be pleased to provide such.

Sincerely,

Malén Aznárez, President, Reporters Without Borders – Spain
Email: rsf@rsf-es.org

Helen Darbishire, Executive Director, Access Info Europe, Madrid
Email: helen@access-info.org

Christophe Deloire, Secretary General, Reporters Without Borders International, Paris
Email: cdeloire@rsf.org

Francesco Diasio, Regional Coordinator, AMARC Europe
Email: fdiasio@amisnet.org

Francesca Fanucci, Lawyer - Consultant on freedom of expression, Senior Associate at Free Expression Associates, London
Email: franfanu@gmail.com

Ricardo Gutiérrez, General Secretary, European Federation of Journalists (EFJ), Brussels
Email: ricardo.gutierrez@ifj.org

Thomas Hughes, Executive Director, Article 19, London
Email: thomas@article19.org

Larry Kilman, Secretary General, WAN-IFRA

¹³ The Organization for Security and Co-operation in Europe called on Spain to strengthen the Transparency Law before it was adopted, and the European Union has done so since.

Email: larry.kilman@wan-iffra.org

Barbara Trionfi, Press Freedom Manager, International Press Institute (IPI), Vienna

Email: btrionfi@freemedia.at